APPENDIX A

In accordance with the requirements of Rule 28.1 of the United States Supreme Court Rules, the following is a listing naming the parent companies, subsidiaries and affiliates of Petitioner Corporations:

Exxon Corporation directly owned affiliates operating in the United States with an ownership of less than 100%:

American Solar King Corporation; Atlas Supply Company; East Texas Salt Water Disposal Company; EOTec Corporation; Grand Ecaille Land Company, Inc.; Houston Regional Monitoring Corporation; Intecom, Inc.; Long Beach Oil Development Company; MESBIC Financial Corporation of Houston; THUMS Long Beach Company; Van Salt Water Disposal Company; Intecom, Inc.; Ramtek Corporation; Scan-Tron Corporation; Supertex, Inc.; The Zito Company, Inc.

Consolidated subsidiary companies of BFGoodrich Company with an ownership of less than 100%:

Bil Tech of California; BFGoodrich Australia Limited; BFGoodrich Chemical Limited; Industria Colombiana de Llantas, S.A.; E.P.P.C Polyplastic S.A.; BFGoodrich Chemical de Venezuela, C.A.

Domestic and foreign subsidiaries and affiliates of Union Carbide Corporation with an ownership of less than 100%:

ACM Services; P.T. Agrocarb Indonesia; Argon, S.A.; Arizona Welding Equipment Company; Bayox Inc.; Biosystemes S.A.; Calida Gas B.V.; Carbide Hashim Industrial Gas Co., Ltd.; Chemos Industries Pty. Ltd.; Chrome Corporation [South Africa] [PTY] Ltd.; CIA National De Calcareos E Derivados; Dai Nippon Jushi Co., Ltd.; Delzan Pty.

Ltd.; Electrona Carbide Industries Pty. Ltd.; Elecktrode Maatskapy Van Suid Africa (Eiendoms) Beperk; Eletromanganes Ltda.; Eletrometalurgica Saudade Ltda.; General Welding Products, Inc.; Indugas N.V.; Joint Industries (Hycel) 1970 Ltd.; La Littorale S.A.; Miami Welding Supply, Inc. Nippon Unicar Co.; Oriental Union Chemical Corp.; Oxigenio Edy S.A.; Oxigeno Del Norte, S.A.; Oy Unifos A.B.; P.T. Karmi Arafura Fisheries; Societe Gabonaise Des Ferro-Alliages; Societe Miniere De Tambao S.A.; Sony-Eveready Inc.; Svenska Viscora Aktiebolaget; Tenngasco Gas Gathering Co.; Tubatse Ferrochrome (Pty.) Ltd.; Tungsmina Desenvolvimento De Industrias Minerais Ltda.; Tungstenio Do Brasil Minerios E Metais Ltda.; Ucar Plastics Ghana Ltd.; Unifos Kemi A.B.; Union Carbide Argentina S.A.I.C.S.; Union Carbide Austria and New Zealand Ltd.; Union Carbide Austria Ltd.; Union Carbide Canada Ltd.; Union Carbide Ceylon Ltd.; Union Carbide Egypt S.A.E.; Union Carbide France, S.A.; Union Carbide Ghana Ltd.; Union Carbide India Ltd.; Union Carbide Kenya Ltd.; Union Carbide Malaysia Sdn. Bhd.; Union Carbide Mexicana, S.A.; Union Carbide New Zealand Ltd.; Union Carbide Sudan Ltd.; Union Gas Co. Ltd.; Union Industrial Gas Corp.; Union Showa K.K.; Viscora (Deutschland) G.M.B.H.; Viscora Italiana; Viscora, S.A.; Viskase Ltd.; Union Carbide Nigeria Ltd.; Union Carbide Pakistan Ltd.; Union Polymers Sdn. Bh.; Union Carbide Yemen Ltd.; Union Carbide Sudan Ltd.; Visking Do Brasil S.A.; Sociedad Anomima White Martins; S.A. White Martins Nordeste.

Domestic and foreign subsidiaries and affiliates of Monsanto Company with an ownership of less than 100%:

Fisher Controls International, Inc.; Fisher Controls Limited; Monsanto (Malaysia) Sdn. Berhad (Monaysia); Nippon Fisher Company, Ltd.; Revertex Industries (N.Z.) Ltd.; ACM Services, Inc.; Agerquim, S.A. de C.V.; Australian Fluorine Chemicals Pty. Limited (A.F.C.); Collagen Corporation; Companhia Brasileira de Estireno (CBE); Daishin Kogyo K.K.; Goyana, S.A. Industrias Brasileiras de Materias Plasticas (GOYANA); Hydrocarbon Products Pty. Ltd. (HPPL); Industrias Resistol, S.A. (IRSA); K.K. Astro Gelande; Kirbi Kasei K.K.; Korag Company Limited; Mitsubishi Monsanto Chemical Company (MMK); Nippon Cooper Kabushiki Kaisha; Plagon S.A.—Plasticos Goyana Do Nordeste (PLAGON); Plax Canada Limited [now 102975 Canada Limited]; Polyamide Intermediates Limited; Resimor Sinteticos do Nordeste S.A. (RESINOR); Rezinex Australia Limited; Ryonichi Nohken K.K.; Sankyo Kasei Sangyo K.K.; Soperton Gum Market, Inc.; Taiyo Kouyo Kabushiki Kaisha.

Tenneco Chemicals, Inc. is a wholly owned subsidiary of Tenneco Corporation, which is a wholly owned subsidiary of Tenneco, Inc. Nuodex Canada, Limited is a subsidiary of Tenneco Chemicals, Inc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2514

Exxon Corporation, the BF Goodrich Company, and Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc.,

Appellants,

v.

Robert Hunt, Administrator of New Jersey Spill Compensation Fund, Clifford A. Goldman, Treasurer of the State of New Jersey, Sidney Glaser, Director of the Division of Taxation, Jerry F. English, Commissioner of Environmental Protection, and the State of New Jersey,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
(D.C. Civil No. 81-1458)

Argued March 2, 1982

Before: HUNTER, WEIS and HIGGINBOTHAM*, *Circuit Judges.*

Reargued June 7, 1982

Before: HUNTER, WEIS and BECKER, *Circuit Judges.*

Opinion filed June 30, 1982

OPINION OF THE COURT

---

* Judge Higginbotham was present at the initial argument of this case but afterwards recused himself and did not participate in the decision.

WEIS, *Circuit Judge.*

Plaintiffs sought a declaratory judgment that a federal statute exempted them from a state tax. Invoking the Tax Injunction Act, 28 U.S.C. §1341 (1976), the district court dismissed the case. We find that, although it recites a federal statute, the complaint does not present a claim that "arises under" federal law. On this ground, as well as on the Tax Injunction Act, we affirm the dismissal for lack of jurisdiction.

Plaintiffs' complaint in the district court alleged that a tax levied under the New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. §58:10-23.11 *et seq.* (West 1982), is "unconstitutional and preempted" by a similar federal statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund Act"), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (to be codified in 42 U.S.C. §§9601-57). In addition, plaintiffs sought a refund of taxes collected by the state under the Spill Act after the federal statute went into effect. The district court dismissed the suit for lack of subject-matter jurisdiction because of the bar imposed by the Tax Injunction Act.

New Jersey enacted the Spill Act in 1976 to control the handling of hazardous substances within the state, require prompt cleanup, and provide compensation for associated costs and damages. N.J. STAT. ANN. §58:10-23.11a. To carry out these purposes, a Spill Compensation Fund within the state treasury is financed by a barrel tax levied upon each owner or operator of a major facility for hazardous substances. *Id.* at §58:10-23.11g, -23.11h, -23.11i.

In the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Congress also dealt with the problems caused by the release of hazardous substances into the environment. The federal Act creates

a Hazardous Substance Response Trust Fund (Superfund), 42 U.S.C. §9631, which is subsidized in part by taxes levied on crude oil, imported petroleum products, and certain chemicals. 26 U.S.C. §§4611, 4661. Section 114(c) of the Superfund Act, 42 U.S.C. §9614(c), states:

> "Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title."

Contending that §114(c) excuses them from paying taxes into the New Jersey Spill Fund, Exxon and the other plaintiffs sought a declaration in the United States District Court for the District of New Jersey. Jurisdiction was asserted under the federal question statute, 28 U.S.C. §1331, and §113(b) of the Superfund Act, 42 U.S.C. §9613(b), which provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act. . . ."

New Jersey moved to dismiss the suit for lack of subject-matter jurisdiction on the basis of the Tax Injunction Act: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The district judge found that New Jersey law does provide an adequate remedy and granted the motion.[1] He reasoned

---

1. The New Jersey Spill Act, N.J. STAT. ANN. 58:10-23.11h(h), provides that the tax imposed shall be governed by the State Tax Uniform Procedure Law. *Id.* at §54:48-1 *et seq.* Taxpayers seeking reimbursement for alleged overpayments may file claims for refunds. *Id.* at §54:49-14. Taxpayers may also protest any finding or assessment of the Director of the Division of Taxation, request an administrative hearing from the Director, and then appeal the Director's determination to the Tax Court. *Id.* at §54:49-18; §54:2-34; §2A:3A-4.1. The Tax Court offers taxpayers a *de novo* hearing on all

that the more specific Tax Injunction Act prevailed over the Superfund Act on the question of jurisdiction and concluded that the state courts can entertain plaintiffs' preemption claim.[2]

On appeal, plaintiffs argue that the district court misconstrued the relationship between §113(b) of the Superfund Act and the Tax Injunction Act. Since §113(b) vests the district courts with exclusive original jurisdiction over cases arising under the Superfund Act, plaintiffs contend that the state courts are unable to grant any remedy. In their view, then, the Tax Injunction Act is no bar because one of the prerequisites for its application is lacking.

The Supreme Court has said of the Tax Injunction Act that "this legislation . . . reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment In Real Estate Assn. v. McNary*, 50 U.S.L.W. at 4018. When a plaintiff requests a district court to grant injunctive relief against a state tax, and the state courts provide an adequate remedy, the complaint must be dismissed for lack of subject-matter jurisdiction. This is because

---

issues of fact and law and is authorized to "grant legal and equitable relief so that all matters in controversy between the parties may be completely determined." *Id.* at §2A:3A-4. An appeal from Tax Court determinations may be had as of right to the Appellate division of the Superior Court of New Jersey. *Id.* at §2A:3A-4.1(c); §2A:3A-10.

2. New Jersey did not raise the eleventh amendment as a defense to the refund count in the district court or in its brief in this court. *See*, Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 459 (1945). In view of our disposition of the case, we need not discuss that issue. However, we note that the Supreme Court has held that the principle of comity bars federal courts from granting a refund of local taxes in the form of damages. Fair Assessment In Real Estate Assn. v. McNary, ___ U.S. ___, 50 U.S.L.W. 4017 (No. 80-427, Dec. 1, 1981).

"[t]he Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts. . . ." *Rosewell v. LaSalle Natl. Bank*, 450 U.S. 503, 515 n.19 (1981). Although the Court once reserved the question, it is settled now that the Act prohibits declaratory as well as injunctive relief. *California v. Grace Brethren Church*, 50 U.S.L.W. 4703, 4706-07 (No. 81-31, June 18, 1982).

At the outset, it is essential to recognize that plaintiffs' attack is directed against a state tax imposed by a state statute. Plaintiffs do not challenge the Superfund Act, but rely on it as a defense against the state tax. The district judge did not quarrel with plaintiffs' allegations that this case presents a federal question and that it "arises under" the Superfund Act. We take a different view of the matter, however, and since it goes to jurisdiction we are bound to make our own determination. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 50 U.S.L.W. 4553, 4556 (No. 81-440, June 1, 1982).

We begin with 28 U.S.C. §1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." An action arises under federal law when "the complaint . . . requires the construction of a federal statute or a distinctive policy of a federal statute requires the application of federal legal principles for its disposition." *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974). The federal question must appear on "the face of the complaint," which means that "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Gully v. First National Bank*, 299 U.S. 109, 112-113 (1936). *See also, Louisville & Nashville R.R. v. Mottley*, 211 U.S.

149, 152 (1908); *Westmoreland Hospital Assn. v. Blue Cross*, 605 F.2d 119, 123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950), the Supreme Court observed that the Declaratory Judgment Act, 28 U.S.C. §2201, enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. As a result, the Court cautioned against entertaining a declaratory complaint that did not really present a federal question on its face:

> "To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because . . . artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act."

Id. at 673-74.

In *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952), the Court went a step further. Plaintiff there sought a declaratory judgment that it was engaged in interstate commerce. It wanted this declaration "to hold in readiness for use" should the defendant, a state agency, attempt to enforce the state's regulatory scheme against it. *Id.* at 245. The Court directed the suit to be dismissed, in language directly applicable to the case at hand:

> "In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the [state] courts. . . Where the complaint in an action for declaratory judgment

> essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. . . . Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law."

Id. at 248.

The criteria espoused by *Skelly* and *Wycoff* have been criticized, but "it seems clear that this is the law today . . ." 10 Wright & Miller, Federal Practice & Procedure §2767 at 849 (1969).[3] In *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237, 241 (3d Cir. 1972), we followed *Wycoff* and held that a complaint seeking a declaration that federal law preempted state regulations did not raise a federal question. Accord, *Lawrence County v. South Dakota*, 668 F.2d 27 (8th Cir. 1982); *Madsen v. Prudential Federal Savings & Loan Assn.*, 635 F.2d 797 (10th Cir. 1981); *Home Federal Savings & Loan Assn. v. Insurance Dept. of Iowa*, 571 F.2d 423 (8th Cir. 1978). *But see*, *First Federal Savings & Loan Assn. v. Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (no discussion of jurisdictional issue). *See* Comment, Federal Jurisdiction Over Declara-

---

3. Legislative adoption of a broader test, one that simply looks to the wording of the declaratory complaint for a federal question, has been recommended by the American Law Institute. A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts, §1311 (1969). "But in view of the limited purpose that was claimed for the Declaratory Judgment Act when it was adopted, it would be a perversion of the statute if it were held to have extended federal question jurisdiction." 10 Wright & Miller §2767 at 849 (1969).

tory Suits Challenging State Action, 79 COLUM. L. REV. 983 (1979).

In summary, a declaratory judgment complaint does not state a cause of action arising under federal law when the federal issue is in the nature of a defense to a state law claim. Yet that is precisely the situation in this case. Exxon and the other plaintiffs seek a declaration that §114(c) of the Superfund Act excuses them from paying the tax imposed by the New Jersey Spill Act. In other words, they wish to establish what is in effect a federal defense to a purely state law enforcement action. *Skelly* and *Wycoff* teach us that under these circumstances federal question jurisdiction is lacking.[4]

Moreover, the Tax Injunction Act also imposes a jurisdictional bar. *California v. Grace Brethren Church*, *supra*. Exxon contends, however, that the exclusive federal jurisdiction provision of the Superfund Act removes from the state courts the power to adjudicate matters which have any connection with the federal statute, including its ban against dual taxation. Without an adequate state remedy, the Tax Injunction Act would not bar this suit. If the district court also lacks jurisdiction, Exxon argues, there is no forum open to it.

We find no merit to this contention. The Superfund Act's grant of "exclusive original jurisdiction" is limited to controversies "arising under" the statute. 42 U.S.C. §9613(b). Thus, exclusive jurisdiction is only conferred over those cases which actually present a Superfund question on the face of the complaint, not every suit in which the provisions of the Act are relevant. It does not include suits like this which challenge a state tax.

Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961), is instructive on this point. There,

4. Exxon is a New Jersey corporation and therefore diversity of citizenship was not pleaded as a basis for jurisdiction.

the Supreme Court was confronted with a challenge to a state court's jurisdiction over a suit brought to recover overcharges in the sale of natural gas. The state court defendants argued that the Natural Gas Act, 15 U.S.C. §717 *et seq.*, grants exclusive jurisdiction to the federal courts over any suit involving a rate filed with the Federal Power Commission. The Supreme Court noted, however, that "questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law." *Id.* at 662. Since the plaintiff's claim was founded on state contract law, there was no federal jurisdiction. As to the "exclusive" jurisdiction conferred by the Natural Gas Act, the Court said, "[e]xclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." *Id.* at 664.

We repeat that this suit is an attack on a state tax and nothing in the Superfund Act deprives the state courts of power to adjudicate this type of dispute. In light of the firmly established legislative policy expressed in the Tax Injunction Act, Exxon's contention that Congress impliedly removed state court authority to decide controversies over the tax imposed by the New Jersey Spill Act is simply not persuasive. *See Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261, 275 (1943). It is questionable whether Congress has the power to deprive a state court of jurisdiction over a non-federal party in such a state law action. *See, e.g., Healy v. Ratta*, 292 U.S. 263, 270 (1933); 1 Moore's Federal Practice §0.6[3] at 234 n.18 (1982). In any event, in light of the strong interest in federalism in circumstances like these, a displacement of state jurisdiction would not be expected in the absence of clear and explicit statutory language.[5]

---

5. It is a matter of record that after the district court dismissed the complaint, plaintiffs filed suit in the Tax Court of New Jersey. No

Exxon also argues that the need for uniform interpretation of the Superfund Act is an important consideration in favor of exclusive federal jurisdiction. Although that reasoning may have influenced Congress in its decision to restrict jurisdiction over the many substantive controversies that may arise under the Superfund Act, it does not justify supplanting state jurisdiction over state laws. Indeed, the Supreme Court rejected this very argument in *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. at 665.

We conclude that the New Jersey courts retain jurisdiction to pass on the validity of the taxes imposed by the state's Spill Act, and that New Jersey law provides an adequate remedy. Since the district court did not have jurisdiction, dismissal of the plaintiff's complaint was proper and accordingly, the judgment will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

---

question of the jurisdiction of that Court has been raised by the parties or the court itself. The parties filed and argued cross-motions for summary judgment. After this case had been argued in this court, the Tax Court of New Jersey ruled on the merits of those motions, Exxon Corp. v. Hunt, Nos. SC 303A-81 and SC 319A-81TC (Tax Court of New Jersey, April 23, 1982), and Exxon has appealed.

New Jersey state legislators also brought suits in the district court to determine whether all of the New Jersey Act was preempted. Lesniak v. United States, D.C. No. 81-977. Merlino v. United States, D.C. No. 81-1914. In a settlement, the parties agreed that in several areas the New Jersey statute was not preempted by the federal act.

APPENDIX C

JULY 27, 1981 OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Before: The Honorable H. Curtis Meanor, U.S.D.J.

Appearances: Farrell, Curtis, Carlin & Davidson

By: John Carlin, Attorneys for the Plaintiffs

James R. Zazzali
State Attorney General
By: Eugene J. Sullivan, Dag,
For the Defendants

(2) THE COURT: I suppose this is a case on which I ought to write an opinion. However, the jurisdictional issue that is raised here is of considerable significance.

The case cries out for expedition so that New Jersey will know what taxes it can collect and to what end it will dedicate them. Exxon certainly has a right to know whether it's being asked to pay to New Jersey a tax that is precluded by federal law.

It is my suggestion, since I'm going to dismiss the matter for lack of subject matter jurisdiction pursuant to 28 U.S.C. Section 1341 that Exxon pursue its relief on both avenues; that it take a prompt appeal to the Court of Appeals from this decision, because before I get into this very complicated case I want to make sure that the jurisdictional base is solid.

I would suggest, that Exxon request the Court of Appeals to expedite this matter. It will permit solely a question of law on a limited record.

I would also suggest because I think the need for prompt resolution of this controversy is paramount, that while the appeal from the decision I'm entering today is pending that Exxon attempt to cooperate with the State of New Jersey and try to place this matter before the New Jersey Tax Court.

If the case comes back to me from the Court of (3) Appeals for decision it will be decided. If I am affirmed it will be a clear-cut statement that the case didn't belong here in the first place and that the only remedy that Exxon has is to litigate the issue projected by Superfund pre-emption before the New Jersey courts.

One reason I do this is the matter of judicial economy. I don't want to go through several months of litigation in a voluminous case only to find out there was no jurisdiction in the first place. That would be a disservice to the judicial system and a disservice to the parties.

By this statement, however, I do not want to be understood as having considerable doubt about the accuracy of this result. I think it is an accurate one. If I thought the other way around I would probably deny the motion and enter a 1292(b) certification so we could get appellate clarification before the complicated case gets under full meritorious sail.

The Superfund is a euphemism for the Comprehensive Environmental Response Compensation and Liability Act enacted in December 1980. It authorizes and provides for a national program for compensation of losses from hazardous waste discharges.

Section 114(c) of the Act states that no one can pay taxes for funds which duplicate the Superfund or (4) its purpose.

New Jersey has such a fund. It is collecting taxes for it from producers of oil and chemicals, and Exxon, as the

lead plaintiff in this case, brings the suit to have the state tax declared unconstitutional as pre-empted by the Superfund. It also seeks a refund of the taxes paid with interest.

28 U.S.C. Section 1341 states: "The District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such a state."

I think if this statute is applicable it certainly does preclude litigation in this court.

In my judgment the New Jersey Tax Court setup does provide a plain, speedy and efficient remedy. It provides a judicial or quasi judicial remedy at a trial level with a right of appeal to the Superior Court, Appellate Division, and right of discretionary review in the State Supreme Court. But since this case raises a constitutional issue I rather imagine there would be a right of appeal to the State Supreme Court in any event.

On its face, Section 1341 would preclude this suit. I think it is clear that the declaratory judgment action as well as claims for injunctive relief (5) against the assessment and collection of taxes and for refunds are precluded as well.

Section 113(b) under the Superfund Act says that: "The United States District Courts shall have exclusive original jurisdiction over all controversies arising under this Act. . . "

I have to say that on the face of it, the complaint filed by Exxon here does arise under Superfund. It lays out Superfund, lays out the New Jersey tax and says Superfund, by its terms, precludes the assessment and collection of the New Jersey tax.

The question that is posed is whether the general language of the Superfund Act conferring exclusive original jurisdiction for cases arising thereunder, is a modification pro tanto of 28 U.S.C. Section 1341.

Apparently this subject was not broached in the legislative history. I do confess I have not had a chance to review the legislative history, but both counsel tell me the effect of the general jurisdictional grant upon Section 1341 was not mentioned in the legislative history and I will, of course, accept their word for it.

I suppose there's a rather simple analysis one could go through. An axiom of statutory construction where you have a general statute and a particular statute, is that the particular statute or specific statute (6) controls.

Applying that maxim here it is obvious that 1341 would control and not the general jurisdictional grant of 113(b).

The problem that has been voiced by Exxon is that the language of 113(b) might be said to preclude state court jurisdiction over a claim arising under Superfund, claiming that the Superfund Act pre-empts the State Taxing Law.

I don't think that is so. First, as we pointed out in argument, if the state really wants to litigate this before the state taxing courts I suspect that a case could be structured whereby the problems would not arise.

Exxon could refuse to pay the tax, be sued for a judgment for the amount of taxes not paid and could defend upon the ground that th tax was pre-empted by federal law.

It would be clear under those circumstances to me that the case would not be one arising under federal law.

It seems to me silly to say the state courts can do through the back door what they can't do through the front door.

Furthermore, putting together 1341 and 113(b), it should (7) be rather obvious that state courts would not be precluded from entertaining actions arising under Superfund where the federal courts could not entertain them.

If I am right in my construction of 1341 it would seem to me that the state courts would be able to entertain a claim arising under Superfund to the extent of contention that Superfund pre-empts state taxing statutes.

The only purpose of this exclusive original jurisdictional grant to the federal courts was to see that the federal courts and federal courts alone administer the statute. Probably there was a desire to avoid conflict in the administration and construction of the statute among the federal courts, which ultimately can speak as the final authority, and the state courts.

There would be no purpose in preventing the state courts from entertaining litigation under Superfund, that would not be within the ambit of the federal court jurisdiction.

Furthermore, with respect to the state court, after all the claim that Superfund pre-empts the state taxing statute is a constitutional claim. I, for the life of me, do not know how Congress would enact jurisdictional statutes governing U.S. District Courts that would have the effect of precluding people within the (8) state court system from raising meritorious federal constitutional issues. I know of no analogy to that, I know of no authority for the statement, but it seems quite sensible to me to say that Congress could not prevent one from

asserting his federal constitutional rights as against state action within the state court system. In fact, such a doctrine would cause me extensive problems.

I am not, therefore, overly concerned with the proposition Exxon may find itself in some kind of a limbo being unable to litigate Superfund pre-emption in this court because of 1341, and by the same token being unable to litigate Superfund pre-emption in the state court because of 113(b) of the Superfund Act. I don't think the judicial system is going to tolerate putting Exxon in such an impossible predicament. So I will, therefore, dismiss the complaint in this case as precluded from adjudication here under 28 U.S.C. Section 1341.

I repeat my admonition that I think Exxon should litigate this issue before the Court of Appeals and also take steps to go before the New Jersey tax court. If the case comes back I'll decide it and I will appreciate expedition by the Court of Appeals because I think this is a significant litigation and the jurisdictional problems ought to be cleared from the underbrush before we get into this case more deeply than we have.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT
No. 81-2514

EXXON CORPORATION, THE BF GOODRICH COMPANY, AND UNION CARBIDE CORPORATION, Monsanto Company and Tenneco Chemicals, Inc.,

Appellants

VS.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY, SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION, AND THE STATE OF NEW JERSEY

Defendant

(D.C. CIV. No. 81-1458)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF
NEW JERSEY—NEWARK

PRESENT: HUNTER, WEIS AND BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey—Newark and was argued by counsel March 2, 1982 and reargued before a reconstituted panel June 7, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 11, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

SALLY MRVOS
Clerk

June 30, 1982

APPENDIX E

CCH TAX REPORT STATEMENT OF DIRECTOR OF DIVISION OF TAXATION

.75—[This is in answer to the question] regarding the New Jersey Spill Compensation and Control Tax and its relation to the Federal P.L. 96-510.

It is the position of the Division [of Taxation] that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510) does not preempt the tax which is imposed under the New Jersey Spill Compensation and Control Act (C.58:10-23.11. et seq.). We shall continue to take this position and collect tax unless a final determination by the courts is to the contrary. *Letter from Director, Division of Taxation, to Commerce Clearing House, Inc.*, May 26, 1981.

© 1981, Commerce Clearing House, Inc.

APPENDIX F

N.J.S.A. 58:10-23.11h

TAXATION OF MAJOR FACILITIES; RATE; REFUND OR CREDIT; CLAIMS EXCEEDING FUND BALANCE; FAILURE TO FILE OR PAY TAX

a. There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee; provided, however, that in the case of a major facility which operates as a public storage terminal for hazardous substances owned by others, the owner of the hazardous substance transferred to such major facility or his authorized agent shall be considered to be the transferee or transferor, as the case may be, for the purposes of this section and shall be deemed to be a taxpayer for purposes of this act. Where such person has failed to file a return or pay the tax imposed by this act within 60 days after the due date thereof, the director shall forthwith take appropriate steps to collect same from the owner of the hazardous substance. In the event the director is not successful in collecting said tax then on notice to the owner or operator of the public storage terminal of said fact said owner or operator shall not release any hazardous substance owned by the taxpayer. The director may forthwith proceed to satisfy any tax liability of the taxpayer by seizing, selling or otherwise disposing of said hazardous substance to satisfy the taxpayer's tax liability and to take any further steps permitted by law for its collection. For the purposes of this act public storage terminal shall mean a public or privately owned major facility operated for public use which is used for the storage or transfer of hazardous substances.

The tax shall be measured by the number of barrels or the fair market value, as the case may be, of hazardous substances transferred to the major facility, provided, however, that the same barrel, including any products derived therefrom, subject to multiple transfers from or between major facilities shall be taxed only once at the point of the first transfer.

When a hazardous substance other than petroleum which has not been previously taxed is transferred from a major in-State facility to a facility which is not a major facility, the transferor shall be liable for tax payment for said transfer.

b. The tax shall be $0.01 per barrel transferred and in the case of the transfer of hazardous substances other than petroleum or petroleum products, the tax shall be the greater of $0.01 per barrel or 0.4% of the fair market value of the product, until the balance in the fund equals or exceeds $50,000,000.00; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined, or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined or rerefined, the tax shall be $0.01 per barrel of the hazardous substance. For the purpose of this section, "precious metals" means gold, silver, osmium, platinum, palladium, iridium, rhodium, ruthenium and copper. In each fiscal year following any year in which the balance of the fund equals or exceeds $50,000,000.00, no tax shall be levied unless (1) the current balance in the fund is less than $40,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. The provisions of the foregoing notwithstanding, should claims paid from or pending against the fund not exceed $5,000,000.00 within 3 years after the tax is first levied, the tax shall be $0.01 per barrel transferred or 0.4% of

the fair market value of the product, as the case may be, until the balance in the fund equals or exceeds $36,000,000.00, and thereafter shall not be levied unless: (1) the current balance in the fund is less than $30,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. In the event of either such occurrence and upon certification thereof by the State Treasurer, the director shall within 10 days of the date of such certification relevy the excise tax, which shall take effect on the first day of the month following such relevy. With respect to the tax imposed upon the transfer of hazardous substances which are other than petroleum or petroleum products, if the revenues from such tax exceed $7,000,000.00 during any calendar year, such excess shall be refunded or credited to the taxpayers who paid such tax during the calendar year. The refund or credit shall be based upon the amount of taxes paid by each taxpayer on transfers of hazardous substances which are other than petroleum or petroleum products for the calendar year in proportion to all taxes paid by all taxpayers on such transfers during said year; provided, however, that if at the end of the calendar year the increased tax rate as authorized by this subsection of subsection i. is in effect, no refund or credit shall be allowed for such calendar year; and further, provided that no refund or credit shall be allowed for a calendar year if by reason of such refund or credit a condition would occur which would authorize the imposition of the tax at the higher rate authorized in this subsection or subsection i. However, a partial refund or credit shall be allowed to the extent that such a condition would not occur. In the event of a major discharge or series of discharges resulting in reasonable claims against the fund exceeding the existing balance of the fund, the tax shall be levied as follows:

(1) On petroleum or petroleum products, at the rate of $0.04 per barrel transferred, until the revenue produced by such increased rate equal 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of petroleum or petroleum products; provided, however, that such rate may be set at less than $0.04 per barrel transferred if the administrator determines that the revenue produced by such lower rate will be sufficient to pay outstanding reasonable claims against the fund within 1 year of such levy; and

(2) On hazardous substances other than petroleum or petroleum products, at the rate of the greater of $0.04 per barrel transferred or 0.8% of the fair market value of such hazardous substance, until the revenue produced by such increased rate equals 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of hazardous substances other than petroleum or petroleum products; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined, or rerefined, the tax shall be $0.04 per barrel of the hazardous substances; and provided further, however, that any such increased tax rate on hazardous substances other than petroleum or petroleum products may be set at less than $0.04 per barrel transferred, or 0.8% of the fair market value of the hazardous substance, as the case may be, if the administrator determines that the revenue produced by such lower rate shall be sufficient to pay outstanding reasonable claims against the fund within 1 year of such levy.

Interest received on moneys in the fund shall be credited to the fund. Should the fund exceed $36,000,000.00

or $50,000,000.00, as herein provided, as a result of such interest, the administrator and the commissioner shall report to the Legislature and the Governor concerning the options for the use of such interest.

c. (1) Every taxpayer and owner or operator of a public storage terminal for hazardous substances shall on or before the twentieth day of the month following the close of each tax period render a return under oath to the director on such forms as may be prescribed by the director indicating the number of barrels of hazardous substances transferred and where appropriate, the fair market value of the hazardous substances transferred to or from the major facility, and at said time the taxpayer shall pay the full amount of the tax due.

(2) Every taxpayer or owner or operator of a major facility or vessel which transfers a hazardous substance, as defined in this act, and who is subject to the tax under subsection a. shall within 20 days after the first such transfer in any fiscal year register with the director on such form as shall be prescribed by him.

d. If a return required by this act is not filed, or if a return when filed is incorrect or insufficient in the opinion of the director, the amount of tax due shall be determined by the director from such information as may be available. Notice of such determination shall be given to the taxpayer liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 30 days after receiving notice of such determination, shall apply to the director for a hearing, or unless the director on his own motion shall redetermine the same. After such hearing the director shall give notice of his determination to the person to whom the tax is assessed.

e. Any taxpayer who shall fail to file his return when due or to pay any tax when the same becomes due, as

herein provided, shall be subject to such penalties and interest as provided in the "State Tax Uniform Procedure Law," Subtitle 9 of Title 54 of the Revised Statutes. If the Division of Taxation determines that the failure to comply with any provision of this section was excusable under the circumstances, it may remit such part or all of the penalty as shall be appropriate under such circumstances.

f. (1) Any person failing to file a return, failing to pay the tax, or filing or causing to be filed, or making or causing to be made, or giving or causing to be given any return, certificate, affidavit, representation, information, testimony or statement required or authorized by this act, or rules or regulations adopted hereunder which is willfully false, or failing to keep any records required by this act or rules and regulations adopted hereunder, shall, in addition to any other penalties herein or elsewhere prescribed, be guilty of a misdemeanor.

(2) The certificate of the director to the effect that a tax has not been paid, that a return has not been filed, that information has not been supplied or that inaccurate information has been supplied pursuant to the provisions of this act or rules or regulations adopted hereunder shall be presumptive evidence thereof.

g. In addition to the other powers granted to the director in this section, he is hereby authorized and empowered:

(1) To delegate to any officer or employee of his division such of his powers and duties as he may deem necessary to carry out efficiently the provisions of this section, and the person or persons to whom such power has been delegated shall possess and may exercise all of said powers and perform all of the duties delegated by the director;

(2) To prescribe and distribute all necessary forms for the implementation of this section.

h. The tax imposed by this act shall be governed in all respects by the provisions of the "State Tax Uniform Procedure Law," Subtitle 9 of Title 54 of the Revised Statutes, except only to the extent that a specific provision of this act may be in conflict therewith.

i. Notwithstanding any other provisions of this section, the Treasurer may order the director to levy the tax on all hazardous substances other than petroleum or petroleum products at a specified rate greater than $0.01 per barrel or 0.4% of the fair market value of the product, as the case may be, but in no event to exceed $0.04 per barrel with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined or rerefined, or the greater of $0.04 per barrel or 0.6% of the fair market value of the product with respect to transfers of any other hazardous substances other than petroleum or petroleum products, if and as long as the administrator determines the following:

(1) That pending, reasonable claims against the fund for hazardous substances other than petroleum or petroleum products exceed 70% of the existing balance of the fund, and

(2) That the sum of the claims paid by the fund on behalf of discharges or removals of hazardous substances other than petroleum or petroleum products plus pending, reasonable claims against the fund on behalf of discharges or hazardous substances other than petroleum is equal to or greater than 70% of all claims paid by the fund plus all pending, reasonable claims against the fund.

The provisions of this subsection shall not preclude the imposition of the tax at the higher rate authorized under subsection b. of this section.

L.1976, c. 141, § 9. Amended by L.1979, c. 6, § 1, eff. Jan. 18, 1979; L.1979, c. 346, § 6; L.1980, c. 73, § 3, eff. July 21, 1980.